

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 FINANCIALAPPS, LLC,

4 Plaintiff,

5 v

6 ENVESTNET, INC., and YODLEE, INC.,

7 Defendants.

- - -
: CIVIL ACTION NO.

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: 19-1337-CFC-CJB

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8 Wilmington, Delaware
9 Monday, December 23, 2019
10 Telephone Conference

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11 BEFORE: HONORABLE CHRISTOPHER J. BURKE, Magistrate Judge

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12 APPEARANCES:

13
14 YOUNG CONAWAY STARGATT & TAYLOR, LLP
15 BY: PILAR G. KRAMAN, ESQ.

16 and

17 KASOWITZ BENSON TORRES, LLP
18 BY: MATTHEW A. KRAUS, ESQ., and
19 JOSHUA E. HOLLANDER, ESQ.
(New York, New York)

20 Counsel for Plaintiff

21 CONNOLLY GALLAGHER, LLP
22 BY: HENRY E. GALLAGHER, JR., ESQ., and
23 LAUREN P. DeLUCA, ESQ.

24 and

25 Brian P. Gaffigan
Official Court Reporter

1 **APPEARANCES:** (Continued)

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3 **SHOOK, HARDY & BACON, LLP**
4 **BY: GARY M. MILLER, ESQ.**
5 **(Chicago, Illinois)**

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7 **Counsel for Defendant**

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23 **P R O C E E D I N G S**

24 **(REPORTER'S NOTE: The following telephone**
25 **conference was held in chambers, beginning at 1:01 p.m.)**

1 THE COURT: Good afternoon, everyone. It's
2 Judge Burke here. Before we begin today, let me just say a
3 few things for the record. And,

4 The first that is we're here this afternoon for
5 a teleconference in the matter of FinancialApps LLC versus
6 Envestnet, et al. This is Civil Action No. 19-1337-CFC-CJB
7 here in our court.

8 We're here this afternoon for a teleconference
9 regarding a discovery-related dispute that has been brought
10 by defendants' side. Before we go further, I'll note that
11 I have a court reporter here with me, Mr. Gaffigan from our
12 court who will be taking down our call this afternoon.

13 I just remind counsel, if they would, to try to
14 remember to identify themselves by name each time they speak
15 to help our court reporter get a good and accurate call
16 record of our call today.

17 Next, let's have counsel for each side identify
18 themselves for the record. We'll start first with counsel
19 for the plaintiff's side; and we'll begin there with
20 Delaware counsel.

21 MS. KRAMAN: Good afternoon, Your Honor. This
22 is Pilar Kraman at Young Conaway for the plaintiffs; and
23 with me on the line is Matt Krause and Josh Hollander from
24 Kasowitz Benson in New York.

25 THE COURT: Good afternoon.

1 MS. KRAMAN: Mr. Krause will be doing the
2 argument today.

3 THE COURT: Okay. Thank you.

4 We'll do the same for counsel for defendants'
5 side, again beginning with Delaware counsel.

6 MS. DeLUCA: Good afternoon, Your Honor. This
7 is Lauren DeLuca at Connolly Gallagher. With me, I have
8 my colleague, Hank Gallagher; and on the line with us from
9 Shook Hardy is Gary Miller who will be doing the argument
10 today.

11 THE COURT: All right. And to you all, good
12 afternoon as well.

13 As I said, it's defendants' motion here, and so
14 I'll turn first to counsel for defendants' side.

15 I have reviewed the letters and so on. I'll
16 start with a few kind of quick questions to defendants, and
17 I'll do the same for plaintiff when it is their turn, but I
18 will, of course, let each side add anything else they wish
19 to add after I ask my initial questions.

20 So is it Mr. Miller who is going to be handling
21 the argument for defendants' side?

22 MS. DeLUCA: That's correct, Your Honor.

23 MR. MILLER: Yes, Your Honor.

24 THE COURT: Mr. Miller, I'll start by saying
25 obviously having seen the other side's response, whether

1 framed in terms of ripeness or framed in terms of whether or
2 not there is a sufficient record to establish good cause,
3 in essence what I think what other side is saying is that,
4 look, we understand the defendant has concerns with regard
5 to third-party contact but there really isn't a sufficient
6 record yet built up here in the case that in fact the
7 plaintiff has engaged in abusive conduct.

8 You know, if we do, if the plaintiff presumably
9 says if we were to go out and to engage in abusive conduct
10 with regard to contact with defendants' employees, that
11 might be one thing, maybe that would at some point justify
12 some type of prior restraint like the one that defendants
13 are seeking here, but there just isn't that kind of record
14 yet. And presumably the plaintiff suggests they won't
15 engage in that kind of behavior.

16 What is your response to why you think there is
17 a sufficient record demonstrating that the plaintiff needs
18 to be further reined in beyond what Rule 45 provides in
19 terms of prior notice to you of third-party discovery
20 requests?

21 MR. MILLER: All right. Thank you, Your Honor.
22 Thank you for your attention to this matter. I will address
23 that.

24 The concern we have is that Rule 45 doesn't
25 provide any timing for the prior notice. It could be five

1 minutes before subpoena is served. It could be an hour
2 before the subpoena is served. It doesn't provide enough
3 mechanism for the parties to meet and confer and have enough
4 time to present the issue to the Court in an orderly way for
5 resolution before the subpoena is actually received. And,

6 The ripeness is our concern, that serving the
7 subpoena is the harm. From the very -- we're really concerned
8 about FinancialApps serving overly broad unnecessary discovery
9 on all of our customers, they identified 28 -- and how that is
10 going to impact our relationship with the clients. And,

11 The concern we think is well founded.
12 FinancialApps made it very clear before the case was even
13 filed that they intended to do that and emphasized the harm
14 that that would cause to us; and it will.

15 They tried to take premature discovery in this
16 case before we had our Rule 26 conference. And then in the
17 meet and confer, they weren't willing to move at all in terms
18 of limiting the number of customers they would contact,
19 limiting scope of the discovery. And,

20 So all we're asking for -- we're not asking for
21 a decision now on which customers you can subpoena or what
22 topics would be covered on it. What we're asking for is
23 to establish a process where we can meet and confer on it.

24 It could be some of the topics, we say we think
25 these are legitimate but we have all the information ourselves,

1 We will give it to you, you don't need to burden our customers
2 with it.

3 It could be topics, probably the customers do
4 have information that is only theirs, but we don't think it
5 is relevant, so maybe we do a phased approach which I have
6 done in other cases which is why don't you serve a subpoena
7 on one customer, two customers, let's see if they produce
8 anything that is relevant that we wouldn't be able to
9 produce ourselves and take it from there rather than just
10 sending out 28 really broad 20 page subpoenas out to all
11 of our customers and everything flows from that, engaging
12 counsel and calls to us and having to work out.

13 Before dragging the customers into this, we know
14 it's going to be a fight, we know there is going to be a
15 fight about it, so all we're trying to do now is establish
16 an orderly process to deal with the fight.

17 So we think that the issue -- that issue, not
18 what exact topics they could serve on customers and which
19 customers, not that topic that is not ripe yet but the topic
20 of can we establish a process to do this in an orderly way
21 to unnecessarily avoid burdening third parties, that issue
22 is ripe; and we think now is the actual perfect time to deal
23 it before they served the subpoenas because that is part of
24 the harm.

25 THE COURT: I think that one of the things you

1 said that by way of explaining why you thought there was a
2 sufficient record here to justify kind of the further
3 process you are asking me to order is that before the
4 litigation, you said the plaintiffs suggested to you that
5 it did in fact intend to send out very broad 20-page type
6 subpoenas to vast amounts of third parties. Is that what
7 you were suggesting? If so, do I have a record of that?
8 And, if so, where?

9 MR. MILLER: That is what I'm suggesting, and
10 what is true. I don't know that that is in our letter that
11 we have a record of it.

12 THE COURT: Okay.

13 MR. MILLER: What is clear though, I suppose,
14 we can get to the same point by the fact that they tried to
15 take discovery already, and the fact that they have
16 indicated on their initial disclosures they intend to do
17 this. And when we tried to talk to them about limiting the
18 scope, they wouldn't limit the scope.

19 THE COURT: Okay. And --

20 MR. MILLER: That is in the record.

21 THE COURT: -- relatedly, the one case you
22 cited, the *May* case was a case where it looks, at least from
23 what the opinion says, the plaintiff had not only filed
24 litigation against the defendant that might implicate third
25 parties but it had actually taken what it seems like the

1 District Court might have thought was aggressive efforts to
2 reach out directly to the third parties prior to that motion
3 being teed up. And,

4 Here, I don't think, unless you tell me
5 different, we have a record of the plaintiff, either prior
6 to the litigation being filed or after it, kind of directly
7 reaching out to third parties in a way similar to what
8 happened by way of the notice letters in May. Do we -- or
9 why else do you think that case is similar to the record we
10 have here?

11 MR. MILLER: Well, we don't have exactly that in
12 this case. I think the point of that case is to show THAT
13 this type of order can be appropriate. There are different
14 circumstances there.

15 But our case, we don't have that, but if --
16 really what it is getting to is there a sufficient risk
17 here that the plaintiff will go and serve some burdensome
18 discovery on a wide variety, a large number of customers
19 who are third parties, and really we should be working to
20 minimize the burden on them. Is there a risk of that? I
21 think that is the appropriate question.

22 In that case, the Court found that there was a
23 risk because of these efforts that were made. That I think
24 we presented enough evidence that there is a risk here, too,
25 in that they have identified 28 customers they intend to

1 serve subpoenas on. When we tried to get them to limit the
2 scope of it, they said they're not going to talk with us
3 about limiting the scope on it, and they made it very clear
4 to us that they're going to serve all 28 of them.

5 So we think we have met that threshold that was
6 accomplished in another way in a different case.

7 THE COURT: Okay.

8 MR. MILLER: But you're right, it's a different
9 fact pattern.

10 THE COURT: Okay. Lastly, obviously, the
11 extent to which in a case where it seemed at the outset like
12 not a lot of third-party discovery might be necessary and yet
13 a plaintiff was threatening to issue quite a lot of third-party
14 discovery. That might create one set of challenges and
15 maybe one kind of a record for a movant. But,

16 On the other hand, in a case where it actually
17 did seem like a pretty fair amount of third-party discovery
18 was going to be necessary, that might be another scenario.
19 It may be less helpful for the movant.

20 Here, from what I understand about the
21 allegations in the case, doesn't it seem like at some level
22 this is a case where we are likely like legitimately going
23 to have a decent amount of third-party discovery because
24 there are third parties, whether they be clients of the
25 defendants who were not utilizing plaintiff's technology or

1 clients of the defendants who were. There are going to be
2 third parties here who kind of legitimately are going to
3 need to be served third-party subpoenas by the plaintiff.
4 Isn't that probably right?

5 MR. MILLER: Well, I don't agree with that
6 actually. There are customers involved, but the question
7 is going to be do those customers have information and
8 documents that can't otherwise be obtained that are relevant
9 to the case? And the answer I think -- I can't think of
10 any category of documents where the answer to that is yes,
11 because this is a service. This is, they called it software
12 and service, cloud-based solution. So everything about what
13 products the customers are on, what software they were
14 using, we have all of that. We have all the information.
15 And so I can't really -- any communication about this, well,
16 we have those too, and, we can turn that over. And,

17 So that is where I'm saying I think there could
18 be -- could conceivably be some limited discovery on certain
19 clients, but I haven't been able to think myself of what
20 they would get from a third party that we don't have and
21 that we're going to turn over.

22 THE COURT: Okay. So I think any discovery that
23 might implicate third parties will likely be cumulative of
24 discovery that you, yourself have and are going to end up
25 providing anyway; is that right?

1 MR. MILLER: Yeah. Well, yes, certainly. And
2 certainly as to that core of the case which has to do with
3 what technology were these customers on, what products are
4 they using? Well, this is all cloud based. It is all
5 sitting with Yodlee, our client.

6 THE COURT: Those are my questions, Mr. Miller,
7 but let me let you add anything more you wish to respond in
8 your letter before I turn to your colleague on the other
9 side.

10 MR. MILLER: Yes. I guess the only final piece
11 of it is when I first read the response, I thought maybe we
12 can get an agreement on this because of the mention of the
13 notice provision of Rule 45, and if we just had enough
14 notice, so it's not an hour, it's not a day, it's maybe a
15 week or something, enough time for us to go in, try to
16 negotiate out the limits on it, and then if not, then be
17 able to present it in a more specific format to the Court?
18 You know, I don't think we're asking for a lot. We're just
19 asking for a little extra notice.

20 I would prefer to have sort of more of an
21 orderly we have X days to object. If we don't reach
22 agreement, we have Y days to approach Your Honor, and sort
23 of a process to do that. But even if it is less formal than
24 that, at least give you a few days or a week, then maybe
25 that is sufficient at this point.

1 THE COURT: Okay. Let me turn to the
2 plaintiff's side. Is it Mr. Krause who is going to be
3 speaking to these issues?

4 MR. KRAUSE: Yes, Your Honor.

5 THE COURT: All right. Mr. Krause, let me start
6 by stating one of the things that Mr. Miller is raising is
7 not just kind of what has happened in the past as to this
8 case which was talked about in his letter but also the fact
9 that you have identified what sounds to defendants like a
10 pretty large number of third parties, 28, that you may be
11 wanting to subpoena. And the worry is 28 clients, maybe
12 with large broad discovery requests, that sounds abusive,
13 potentially, says defendants' counsel.

14 Is there anything you want to say in response to
15 convince the Court that, look, although we may have listed
16 28 third-party entities, we're intending to go about this
17 in a much more kind of meticulous approach where if the
18 defendants have fears that tomorrow there is going to be 28
19 100 paragraph subpoenas sent out to 28 different third-party
20 clients, that is just wrong? Is there anything you want to
21 say in that regard?

22 MR. KRAUSE: Yes, Your Honor. I'll first start
23 by saying I think you had it correctly when you were talking
24 about third-party discovery in this case. I think it is
25 absolutely necessary. It is absolutely necessary both

1 because of the complaint that we have alleged and the
2 counterclaims that defendants have now brought. This idea
3 that we're going to serve abusive requests or some kind of
4 voluminous requests, that is not at issue. That was never
5 at issue. It was never threatened in this case.

6 What we intend to do is what we set out in our
7 letter to Your Honor which is serve very narrow requests on
8 the risk insight customers, requests about the software
9 itself, request about the payments that were made, internal
10 communications. We're not talking about communications to
11 anything that is duplicative of what we're getting from
12 Yodlee or from Envestnet. We're going to be focusing on
13 internal communications.

14 We have made numerous allegations regarding
15 misrepresentations that Yodlee and Envestnet have made to
16 these customers based on what happened to the contract with
17 them, during the contract with them, and then services that
18 were suspended. Those allegations are set forth in the
19 complaint.

20 Also, we have allegations regarding the
21 financial terms that were entered into, terms that were
22 supposed to be given to us that were never given; and we
23 have allegations in there as well regarding payments that
24 were supposed to be made to us, revealed to us and paid to
25 us that were not; internal communications regarding the

1 payments; and told them the payments themselves for each of
2 these customers is highly relevant.

3 So to the extent we opened the door with our
4 complaint to third-party discovery, defendants kicked it
5 wide open when they put at issue the satisfactory -- whether
6 or not there are issues with the software, whether or not
7 defendants found it satisfactory, and the functionality of
8 our software with each of their clients.

9 So these are issues that are squarely -- that
10 third-party discovery is necessary, and they are very
11 narrow. They're a narrow set of things.

12 So this idea that we would be serving somehow
13 abusive requests, we never did that, we never said we would
14 do that, we don't intend to do that, and we will not do that.

15 When it comes to the number of customers, that
16 just happens to be the number of customers.

17 What we're asking is very, very limited, but
18 it's something that applies. If it is relevant to one
19 customer, it is relevant to the next customer. And we're
20 not talking about mom-and-pop companies, we're talking about
21 some of the largest financial institutions in the country,
22 the Bank of Americas of the world. These are institutions
23 that have entire internal firms that are set up to respond
24 to subpoenas in the normal course, so I don't believe it is
25 going to be harassment, and we have no intention to do so.

1 With respect to the process that Mr. Miller
2 is suggesting that we adopt here, we entered into a very
3 expedited schedule here, very aggressive. Fact discovery
4 ends I believe May 1st.

5 Putting another layer to this process, when we
6 know we're going to be requesting all this information from
7 a third party, and going through the process, and setting up
8 meet and confers, and protective orders, all baking into
9 this issue, we think is just going to, it's going to
10 elongate the process, and it's going to add more burden to
11 all the parties involved. It's not going to alleviate any
12 burden, it's going to cause some burden.

13 As Your Honor suggested earlier as well, not
14 only did we not threaten to serve all the overly broad
15 subpoenas, there has been no record of any misconduct.
16 There has been no record of any reaching out to third
17 parties or anything of that nature that was present in May.
18 So the record is not in there to suggest that somehow there
19 would be some abuse of the process. We don't intend to do
20 that, and we won't do that.

21 THE COURT: Mr. Krause, in terms of my question
22 about kind of the sheer number of third parties that are
23 allegedly referenced in your disclosures, one response that
24 you could have made is, Judge, yes. Are there 28 entities
25 listed? Sure, because it is literally possible that we

1 could find the need to subpoena all 28 of them. But do we
2 intend on Day One to go issue subpoenas to every single one
3 of those entities? No. We're anticipating some kind of a
4 phased approach, and it may depend in terms of what we see
5 from certain of those entities by way of responses whether
6 we need to implicate others.

7 You didn't say that, so that makes me wonder
8 whether in fact you do plan on kind of reaching out to all
9 28 right away and getting 28 different sets of entities
10 involved with their counsel. Is that right or am I
11 misreading your response?

12 MR. KRAUSE: Well, Your Honor, I think what we
13 intend to do in the process that we intend to follow is one
14 where we serve a number of requests limited to the number of
15 requests on to the customers? And if it's 28 -- it may be
16 29. I think it is fewer than 28, it may be in the 20s,
17 but these are all customers that are at issue in both the
18 complaint and the counterclaims.

19 There is numerous allegations in the defendants'
20 counterclaims that somehow there are issues and problems
21 and the software is problematic. We don't believe there is
22 anything to this. So the internal communications for each
23 of these, we believe that the internal communications for
24 each of these clients will show that this is not -- this is
25 fiction. This did not happen. There were no prospective

1 internal communications.

2 We also think, with respect to the payments, the
3 terms of the payments and how the payments were made all
4 kind of done in a black box which shouldn't have been. It
5 was a violation of the contractual duties of Yodlee, so it's
6 all information that we want.

7 Again, if we do go out and serve 20 subpoenas,
8 it's going to be for a very limited information that is
9 very relevant to our claims and for the prosecution of our
10 claims, for the defense of the counterclaim.

11 THE COURT: And with regard to the difference
12 between the process that the defendants are asking for
13 versus what would kind of naturally happen pursuant to Rule
14 45, it sounds like your concern is in the area of delay.
15 That the reason why you won't agree to the defendants'
16 process is because you think it will unnecessarily delay
17 the ability of third parties to ultimately respond timely to
18 your requests which you say are going to be reasonable. Is
19 that right? And are there any or kind of concerns you have
20 when you compare what the defendants are asking for versus
21 what would probably naturally play out under the rules if
22 you issued some or all of these subpoenas?

23 MR. KRAUSE: Well, I think, the first part is,
24 yes, that as we think it should proceed in the normal course,
25 and there is no reason to deviate from that. And if the --

1 if defendants want to put in a protective order, they can do
2 so. But the idea that just the mere existence of a subpoena
3 is somehow something that they can object to, we don't agree
4 with that, and there is no legal support for just the issuance
5 of a subpoena, a real subpoena in the normal course, not
6 trying to harass, just trying to get relevant information. We
7 think that is something that we should proceed in the normal
8 course. And,

9 Secondly, it goes to what is behind the request,
10 right? In the sense they're asking for a second protective
11 order; and as we laid out in the letter, a defendant moving
12 for protective order when it comes to a subpoena, it is a very
13 limited set of objections that they can raise. They don't
14 have standing to raise most objections. So we think that the
15 process at the end of the day is going to be futile because
16 we're not talking about some kind of privileged or protected
17 information, we're talking about internal communications that
18 they have no standing to object to. And, also,

19 Many of these subpoenas are being served outside
20 the jurisdiction of the Court. There are jurisdictional
21 issues here when it comes to motions to quash and the like.

22 So I think there is good sense to proceed in the
23 normal course that somebody, pursuant to the federal rules,
24 to the extent they have any issues, they can raise them, but
25 most of the issues, the ones they're talking about now is

1 not something that is countenanced by force.

2 THE COURT: Lastly, to the extent I deny the
3 motion and you issue some or all of these subpoenas and
4 provide notice, of course, to the defendants under Rule 45,
5 and to the extent that the defendants reach out to you and
6 say, look, we have some concerns about scope or about
7 standing or about other related issues, do you stand ready
8 and willing to work with defendants to hear their concerns
9 and perhaps modify the subpoenas if you think they make
10 good points?

11 MR. KRAUSE: I think that is right, Your Honor.
12 I think, to have the conversation about a hypothetical
13 communication from -- a hypothetical subpoena, rather,
14 before it's issued I think it is a little tough, but I think
15 after the subpoenas are issued, if they raise certain issues
16 or if there are certain things that we have asked for that
17 they don't think is appropriate, we, of course, would be
18 willing to listen to them. And if we determine that there
19 is good reason to modify the subpoena, I think that we would
20 be amenable to such a process.

21 THE COURT: All right. Mr. Krause, anything
22 else? Those are my main questions. Are there other things
23 you wanted to mention in response to what you heard from the
24 other side?

25 MR. KRAUSE: I don't believe so, Your Honor.

1 THE COURT: All right. Let me give the movant,
2 Mr. Miller, a chance to make brief rebuttal by way of
3 getting the last word as it is his motion.

4 MR. MILLER: Thank you, Your Honor.

5 On the point of the schedule and the delay
6 point, I just -- we will be filing a motion for protective
7 order. I can't imagine we won't given what Mr. Krause has
8 said before and what he just said on this call. And so
9 I'm trying -- what we're proposing actually might expedite
10 things. All we're proposing is to have that motion be
11 before the parties served rather than after, and we're happy
12 to go act on it. That is point one.

13 Point two. The categories of documents that
14 Mr. Krause said he can get from the clients that he can get
15 from us, neither of those -- he didn't prove his point.

16 The payment is -- he is talking about money that
17 our clients received. We have the best evidence of what
18 money we received. The internal communications regarding
19 how the software performed, all that is relevant is
20 complaints that customers made about the software. We have
21 the complaint.

22 As far as that goes, that category, those are
23 the only two categories he mentioned. The payments point is
24 obviously we have it.

25 On the complaints point, problems the customer

1 had with the software, well, we never said that every single
2 one of the 28 customers complained. So in an orderly way to
3 do this, an appropriate way not to burden third parties
4 would be serve interrogatories on us: Who complained? Who
5 didn't complain? Maybe there were five, five, six customers
6 that complained. Well, serve subpoenas on them. Don't
7 serve on subpoenas on everyone else that we're not even
8 complaining complained about it.

9 I have another --

10 THE COURT: Mr. Miller, just on the complaints
11 issue, I mean obviously just sitting here, it's not
12 implausible to think of scenarios where customers who may
13 have well have complained where there might well be material
14 sitting on their computer servers or documents printed out
15 at their client's sites in which they are discussing their
16 own internal views about such complaints in a way that where
17 those documentations wouldn't necessarily be resonant at
18 defendants' location; right? I mean we can think of lots
19 much scenarios in which, even as to that small issue area,
20 third parties here might well have unique relevant
21 documentation that is at issue in the case; right?

22 MR. MILLER: I would agree with that, but
23 then the way to deal with it I would think would be is to
24 identify customers who made complaints. We have the
25 complaint. And then as to those customers, maybe there

1 could be a couple typed document requests as to those
2 customers rather than serving a broad subpoena with a whole
3 bunch of categories on 28 customers.

4 So we're not saying no third-party discovery, no
5 subpoenas on customers. We're saying blanket subpoenas on
6 all of them is what is inappropriate. And,

7 I have a suggestion, too, that rather than
8 having 28 customers, or 26, whatever the number ends up
9 being, all with separate counsel, all citing the stuff
10 possibly in multiple jurisdiction Mr. Krause raised;
11 instead, what I would suggest is have them pick one or two
12 customers they particularly care about. Ones where the
13 issues can be presented to Your Honor in this jurisdiction
14 and kind of sort out the issues with respect to those
15 subpoenas and then the rules could apply to the others. And,

16 In my experiences, other jurisdictions, if this
17 is litigated in Illinois, for example, an Illinois subpoena,
18 they're going to defer to you as you know more about it, the
19 judges will. So let's have it done once, in respect to one
20 or two subpoenas rather than trying to do 28 all happening
21 at the same time.

22 THE COURT: Okay. Anything further, Mr. Miller?

23 MR. MILLER: No. Thank you, Your Honor.

24 THE COURT: All right. Counsel, thank you.

25 Appreciate the arguments. And I'm going to try to resolve

1 the issue on the call today, as I know it is one that the
2 parties could benefit from getting quick guidance from the
3 Court on; and I know also we're right up against a holiday
4 season as well. And,

5 So the transcript of our call will serve as the
6 Order of the Court. And at this point, I'm going ultimately
7 to deny the defendants' motion at this time for the reasons
8 that I will explain in just a second.

9 Ultimately, I find that the defendants haven't
10 met the burden of demonstrating good cause for the type of
11 protective order they're seeking the Court to impose at this
12 stage pursuant to Rule 26(e).

13 I say that for a couple of reasons:

14 First, this isn't a case, as far as it strikes
15 the Court, where the concept that there might be important
16 or relevant third-party discovery is remote. The nature of
17 the allegations at least in the complaint and perhaps in
18 the counterclaims as well are about not just disputes that
19 relate to these two parties or, I should say, three parties,
20 but also disputes that implicate third-party entities.
21 There are many third parties, for example, listed by name in
22 the complaint itself. And,

23 So it does seem to me very likely that third
24 parties might have relevant and potentially unique information
25 in the case. And I don't really have a record to suggest, at

1 least so far, that any third-party discovery is likely to be
2 extremely cumulative.

3 So that is all to say just as a starting point,
4 the nature of the allegations here are not ones that make
5 me suspicious as to whether it is even appropriate for the
6 plaintiff to be talking about issuing third-party discovery
7 early in the game. And,

8 Secondly, I really don't have a sufficient record
9 here of the type where I would have a base of information that
10 would suggest to me that I'm on good standing in going beyond
11 what Rule 45 calls for by way of third-party discovery
12 provisions. And,

13 I say that for a couple of reasons:

14 First, we don't have any third-party subpoenas
15 that have been issued yet. So the plaintiff tells me on
16 this call that it is going to be mindful of the issues that
17 we have raised and be focused on issuing relatively narrowly
18 issued subpoenas that are relatively narrow in scope.

19 That may well be so. We don't have subpoenas
20 that have been issued that suggests that that promise was a
21 false one and instead that, as defendants worry, incredibly
22 broad. Many, many paragraph subpoenas were issued to many,
23 many third-party defendants.

24 I also don't have a record here of the kind of
25 plaintiff to third-party abusive contacts that there might

1 be in cases where a court would step up early and start to
2 enter additional provisions restricting plaintiff contact to
3 third parties. I think some of that was going on in the *May*
4 case which is the one case that the defendants cite in
5 support of their request. We don't have that here. We
6 don't have a record of that here. Indeed, I'm not aware
7 of the plaintiffs having directly contacted any of these
8 third parties prior to or during this litigation. And,

9 Thirdly, with regard to the lack of record, it's
10 also relevant to me that defendants obviously have raised
11 their concerns here early in the case and on this call, and
12 the plaintiffs have to be mindful about how they pursued
13 third-party discovery from here on out.

14 If they do so in a way that is unduly aggressive
15 or threatening or incredibly overbroad in scope, I'm sure I
16 will hear from defendants in the future by way of a further
17 discovery dispute pointing out the actual record that will
18 exist that supports their contentions that more process is
19 needed.

20 On the other hand, if the plaintiffs kind of,
21 while going forward with third-party discovery under the
22 rules, are mindful of the concerns that have been raised
23 and they kind of take an approach here with regard to
24 third-party discovery that is focused and appropriate, we
25 might well avoid some or all of those disputes in the future.

1 And so,

2 All that being said, I just don't have a record
3 that would support doing more than what the rules require at
4 this point. And I'm not prepared to issue a protective
5 order that goes beyond what the rules require without such a
6 record. I don't find there is good cause to justify such
7 actions at this time.

8 Again, though, I encourage the parties.
9 Obviously, notice will be provided by way of these third-party
10 subpoenas that are issued. I encourage the parties to try to
11 work together as best they can to try to resolve issues of
12 third-party discovery scope or cumulativeness so that we can
13 attempt to minimize the amount of disputes we have in the
14 future with regard to these issues, but if we do have them,
15 I'll be prepared to address them on a better record than we
16 have now.

17 All right. With all that said, and
18 understanding the Court's decision, is there anything
19 further I need to take up at this time with regard to this
20 matter from the plaintiff's side, Mr. Krause?

21 MR. KRAUSE: No, Your Honor. Thank you.

22 THE COURT: All right. And on the defendants'
23 side, Mr. Miller?

24 MR. MILLER: No. Thank you, Your Honor.

25 THE COURT: All right. With all that said, I

1 wish everyone on the call a very happy holiday season, look
2 forward to continuing to work with the parties on this case.
3 We'll end our call today and go off the record. I wish
4 everyone a good day and a good week. Take care.

5 (Telephone conference ends at 1:37 p.m.)

6
7 I hereby certify the foregoing is a true and accurate
8 transcript from my stenographic notes in the proceeding.

9 /s/ Brian P. Gaffigan
10 Official Court Reporter
11 U.S. District Court
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